No. 91 1023

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1991

KENNETH R. CLARK,
Petitioner,

v.

VELSICOL CHEMICAL CORPORATION;
FORSHAW CHEMICAL INCORPORATED,
Respondents.

THOMAS O. RHYNE,
Petitioner,

v.

VELSICOL CHEMICAL CORPORATION;
FORSHAW CHEMICAL INCORPORATED,
Respondents.

WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether federal question jurisdiction exists when a Plaintiff's state cause of action for negligence relies solely on the interpretation of federal law; but the Plaintiff has no private federal cause of action.

II. Whether the District Court and Fourth Circuit abused its discretion when in the face of an expired statute of limitations, no steps to preserve Plaintiffs' state cause of action were taken prior to dismissing the Plaintiffs' case in federal court for lack of jurisdiction.

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PRIOR DECISIONS IN THIS CASE

On August 14, 1990, the United States District Court, Eastern District of North Carolina, Wilmington Division, in No. 89-81-CIV-7-F, entered an order dismissing Petitioners' actions due to the absence of federal subject matter jurisdiction.

On September 10, 1991, the United States Court of Appeals for the Fourth Circuit in No. 90-1841 and 90-1842 affirmed the District Court's Order finding the dismissal to be "without prejudice."

GROUNDS FOR JURISDICTION

The Petitioners herein seek review of the Opinion entered on September 10, 1991 by the United States Court of Appeals for the Fourth Circuit affirming

the District Court's dismissal of Petitioners' actions. This Petition is submitted within 90 days after entry of the decree of the United States Court of Appeals for the Fourth Circuit. See Supreme Court Rule 13.1. Jurisdiction in this Court is conferred by 28 U.S.C.A. Section 1254 (1)(1937) upon issuance of Writ of Certiorari.

STATEMENT OF THE CASE AND FACTS

Plaintiffs' Complaints allege the following:

At some time prior to September 2, 1986, the Defendants caused a five (5) gallon container of hazardous chemical chlordane (Gold Crest C-100 emulsifiable concentrate, E.P.A. registration No. 876-63-AA, with listed active ingredient of 72 percent technical chlordane) to travel through interstate commerce to

Dodson Brothers Exterminating Company, Inc., in Wilmington, North Carolina, utilizing the services of United Parcel Services. The drum in which this hazardous chemical, chlordane, was contained, did not comply with the mandatory provisions of Title 49 of the Code of Federal Regulations regulating the shipment of hazardous materials, nor the mandatory packaging requirement of Title 49. The packaging and labeling thereon likewise did not comply with the mandatory provisions of Titles 29 and 49 of the Code of Federal Regulations.

On September 2, 1986, the Petitioners were employees of United Parcel Services in Wilmington, North Carolina. On that date, the container in which this chlordane was contained began leaking. In the course and scope of their employment with United Parcel

Services and in an attempt to repair this leaking container, the Petitioners were exposed to chlordane, through the skin and inhaled the same, proximately causing the Petitioners' damages.

Petitioners contend that the negligence of the Defendants in not complying with the mandates of Titles 29 and 49 of the Code of Federal Regulations caused the Petitioners' exposure to chlordane and Petitioners' resultant injuries. This is Petitioners' only allegation of negligent conduct. Petitioners rely exclusively on Defendants failure to comply with federal law as the basis of their lawsuits.

On September 1, 1989, Petitioners Kenneth R. Clark and Thomas O. Rhyne timely filed this action in the United States District Court for the Eastern

District of North Carolina, Wilmington Division seeking compensatory damages for the personal injuries they suffered. Petitioners alleged federal subject matter jurisdiction pursuant to 28 U.S.C. Section 1331 and Section 1332, based upon (1) diversity of citizenship among the Petitioner and Defendant Velsicol and (2) a federal question to wit: violation of Titles 29 and 49 of the Code of Federal Regulations. Petitioners concede there is no diversity of citizenship but continue to assert federal question jurisdiction exists.

On October 12, 1989, Defendant Forshaw filed a Motion to Dismiss and Memorandum, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, contending that the court lacked jurisdiction over the

subject matter of the action and the Petitioners' Complaints failed to state a claim upon which relief could be granted. On October 24, 1989, Defendant Velsicol filed it's Answer to Petitioners' Complaints in which it asserted as an affirmative defense that the District Court lacked subject matter jurisdiction over this action.

On November 3, 1989, Petitioners filed their Memorandum and Reply to Defendant Forshaw's Motion to Dismiss. By Order and Judgment of August 14, 1990, the District Court dismissed Petitioners' Complaints "due to the absence of federal jurisdiction." On September 10, 1991, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's Order finding the dismissal was not an

adjudication on the merits and was "without prejudice."

ARGUMENT

PETITION FOR CERTIORARI SHOULD BE GRANTED IN THAT:

(A) A PRIOR DECISION OF THIS COURT MERRELL DOW PHARMACEUTICALS, INC. V. THOMPSON, 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986), (5-4 DECISION) HAS RECEIVED VARYING INTERPRETATION BY SEVERAL CIRCUIT COURTS CREATING AMBIGUITY AS TO THE SIGNIFICANCE OF THE RULING. SEE SUPREME COURT RULE 10.1(a);

(B) IT IS CRITICALLY IMPORTANT THAT JURISDICTION OF THE FEDERAL COURTS BE CLEARLY DILINEATED. SEE SUPREME COURT RULE 10.1(c)

(C) THE DISTRICT COURTS DISMISSAL OF PETITIONERS' CLAIMS IN THE FACE OF AN EXPIRED STATUTE OF LIMITATIONS WITHOUT TAKING STEPS TO PRESERVE A RIGHT TO REFILE IN STATE COURT WAS AN ABUSE OF DISCRETION AND THE FOURTH CIRCUIT'S AFFIRMATION OF THE DISTRICT COURT'S ORDER IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS. SEE SUPREME COURT RULE 10.1(a).

The import of the Merrell Dow Decision has been construed differently

by various Circuit Courts of the United States Court of Appeals. Given the critical importance of a clear delineation of federal jurisdiction the parameters of the Merrell Dow decision should be interpreted by this Court in order that litigants may proceed in the proper forum and avoid the harsh results which the Petitioners herein are currently facing.

A. Merrell Dow and its progeny have created uncertainty as to whether or not federal question jurisdiction exists when a plaintiff alleging federal question jurisdiction asserts a state claim in federal court and the outcome "necessarily depends on a substantial issue of federal law," but the Plaintiff has no private right of action under that federal law.

1. The law as it existed pre-Merrell Dow

"The District Court shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the

United States." 28 U.S.C. Section 1331 (1940)(emphasis added).

In setting boundaries on the exercise of subject matter jurisdiction, the courts have drawn distinctions between controversies that are collateral and those that are basic; and; between disputes that are merely possible and those that are necessary. Gully v. First National Bank, 229 U.S. 109. 57 S.Ct. 96, 81 L.Ed. 70 (1936). Whether a case "arises under" federal law must be determined by the allegations of the Plaintiff's complaint. Taylor v. Anderson, 234 U.S. 74, 34 S.Ct. 724, 58 L.Ed. 1218 (1914). This is known as the "well-pleaded complaint rule." Application of the Rule limits the court's inquiry on the jurisdiction issue to the face of the complaint; any

defenses of the Defendant based on federal law are irrelevant. Id.

Subject matter jurisdiction can be based on diversity of citizenship or federal question. 28 U.S.C. Section 1331, Section 1332. Where diversity of citizenship is lacking, jurisdiction depends on whether the claim "arises under" the Constitution or laws of the United States. Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 41 S.Ct. 243, 65 L.Ed. 577 (1921). If the claim "arises under" federal law, it presents a federal question and subject matter jurisdiction exists. 28 U.S.C. Section 1332 (1940).

There are two tests to determine if a federal question exists. The Holmes Test provides "[a] suit arises under the law that creates the cause of action." American Well Works Co. v. Layne &

Bowler Co., 241 U.S. 257, 36 S.Ct. 585, 60 L.Ed. 987 (1916). It is well recognized that the Holmes Test is more a description of the majority of the cases that come within the federal courts' jurisdiction than a description of those cases that fall outside the courts' jurisdiction. Franchise Tax Bd. v. Constr. Laborers Vac. Trust, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d. 420 (1983); Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed.2d. 650 (1986).

The second test, to determine if a federal question exists, has been continually evolving since the early 1900's. This test is applied if a state law creates the cause of action. A brief history of its evolution is necessary to fully understand the test.

A claim "arises under" the Constitution or a law of the United States whenever the outcome depends on the construction of federal law. Smith v. Kansas City Title & Trust Co., supra. For example, a claim arises under federal law where there is a controversy in which one construction renders a favorable decision for one party; and another construction renders a favorable decision for the other party. Id. A right created by the Constitution or other federal law, must be an essential element of the plaintiffs' cause of action. Gully v. First National Bank, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936).

It has long been the law that a suit must really and substantially involve a dispute or controversy as to the validity, construction or effect of

a federal law before subject matter jurisdiction will lie. Shulthis v. McDougal, 225 U.S. 561, 32 S.Ct. 704, 56 L.Ed. 1205 (1911); in accord, Hogan v. Lavine, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d. 577 (1974) (A **substantial** federal question is necessary to support federal subject matter jurisdiction.) This Supreme Court has held that unsubstantial means obviously frivolous, devoid of merit, obviously without merit or so unsound that there can be no controversy. Id.

In Franchise Tax Bd. v. Constr. Laborer Vac. Trust, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983), this Court, after reviewing the evolution of this second test, held that "Congress has given the lower federal courts jurisdiction to hear originally or by removal from a state court, only those

cases in which a well pleaded complaint establishes either that federal law creates the cause of action or that the Plaintiff's right to refile necessarily depends on resolution of a substantial question of federal law." Id. 463 U.S. at 28 (emphasis added). Applying this test to the facts in Franchise the court found that a suit by state tax authorities to enforce a tax against funds held in trust pursuant to a federal statute (Employee Retirement Income Security Act -ERISA) and to declare that levy valid did not establish federal jurisdiction because the state could succeed under state law without reference to federal law.

2. Merrell Dow

This Court in Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed.2d.

620 (1986), purported to modify the Franchise test for "cases arising out of a state law cause of action." However, Plaintiffs contend that Merrell Dow is not controlling in the case at bar. In Merrell Dow, plaintiff sued Defendant Merrell Dow alleging negligence, breach of warranty, strict liability, fraud, and gross negligence arising out of the Defendant's manufacture and distribution of a drug called Benedectin. Plaintiff alleged that birth defects resulted from the mother's ingestion of Benedectin. Additionally, Plaintiff alleged that the drug was misbranded in violation of the Federal Food, Drug and Cosmetic Act. (FDCA), 21 U.S.C. Section 301, in that its labeling did not provide adequate warning as to its dangers. Plaintiff's complaint alleged that this violation "constitutes a rebuttable presumption of

negligence . . . [and] directly and proximately caused the injuries suffered." Id. 478 U.S. at 806.

Plaintiff filed his action in Ohio State Court and Defendant petitioned for removal to Federal District Court. Plaintiff then filed a Motion to Remand. Relying on Smith v. Kansas City Title & Trust Co., supra, Plaintiff's motion was denied. The Sixth Circuit reversed relying on Franchise Tax Bd. v. Constr. Laborers Vac. Trust, supra. The Sixth Circuit held that federal question jurisdiction would only exist where relief depended necessarily on a substantial question of federal law. The Plaintiff's complaint merely referred to the FDCA as one available criteria for determining whether the Defendant was negligent. "Because the jury could find negligence on the part

of the Defendant without finding a violation of the FDCA, the Plaintiff's cause of action did **not depend necessarily** on a question of federal law". Id., 473 U.S. at 807, (emphasis added). Upon petition of Defendant, this Court granted Certiorari.

Justice Stevens writing for the majority (5-4 decision) phrased the issue presented as: "whether the incorporation of a federal statute in a state-law private action, when Congress has intended that there not be a federal private action for violations of that federal standard, makes the action one arising under the Constitution, laws, or treaties of the United States, 28 U.S.C. Section 1331" Id. 478 U.S. at 805. The majority answered in the negative.

In reaching its conclusion, this Court noted that the vast majority

of cases for which federal question jurisdiction exists are those which meet the Holmes test of "arising under the law that creates the cause of action" American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 36 S.Ct. 585, 60 L.Ed. 987 (1916). However, this court also noted that, a case may "arise", within the meaning of 28 U.S.C. Section 1331, under federal law where relief under state law **necessarily** turns on construction of federal law. Smith v. Kansas City Title & Trust Co., supra; Franchise Tax Bd. v. Constr. Laborers Vac. Trust, supra. (emphasis added).

Both parties in Merrell Dow agreed that there was no federal cause of action for the FDCA violation. The majority stated it would defy or at least undermine Congressional intent to provide remedies under those federal

statutes solely because that violation is said to be a rebutable presumption or a proximate cause under state law.

The Plaintiff contended that he had alleged a substantial, disputed question of federal law that was a necessary element of one of his state claims and that such allegation, under Franchise, supported a finding of federal jurisdiction. In response this court quoted Gully v. First National Bank, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936), regarding the degree to which a federal law must be in the forefront of a case. The courts must draw distinctions between those cases where disputes under federal law are necessary and those where disputes are merely possible. This importance of judicial scrutiny was also

recognized in Franchise Tax Bd. v. Constr. Laborers Vac. Trust Co., supra.

The majority concluded that the "Congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a Congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently substantial to confer federal jurisdiction." Merrell Dow, 478 U.S. at 814. In a corresponding footnote, (note 12), the Court discussed the importance under 28 U.S.C. Section 1331, of an "evaluation of the **nature** of the federal interest at stake." Id. (emphasis original). In fact, the Court distinguished Smith v. Kansas City Title & Trust Co. supra, from Moore v. Chesapeake & Ohio R.R. Co., 291 U.S.

205, 54 S.Ct. 402,78 L.Ed. 755 (1934), utilizing this factor. In Smith the Plaintiff's claim depended upon determination of the constitutionality of a state statute. Whereas, in Moore, the violation of a federal statute was alleged in order to aid a showing of duty and subsequent breach. The majority distinguished these cases by noting the varying importance of the nature of the federal interest.

In summary, the Court stated that "a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress had determined that there should be no private, federal cause of action for the violation, does not state a claim `arising under' the Constitution, laws or treaties of the United States. 28 U.S.C. Section 1331." Merrell Dow, 478

U.S. at 817. Accordingly, the Court affirmed the Sixth Circuit's Judgment.

The dissent by Justice Brennan, who was joined by Justices White, Marshall and Blackmun, concluded that Plaintiff's allegations in his complaint clearly gave rise to federal jurisdiction. The dissent criticized the ruling of the majority as conclusory:

> Why should the fact that Congress chose not to create a private federal **remedy** mean that Congress would not want there to be federal **jurisdiction** to adjudicate a state claim that imposes liability for violating the federal law? Clearly, the decision not to provide a private federal remedy should not affect federal jurisdiction unless the reasons Congress withholds a federal remedy are also reasons for withholding federal jurisdiction. Thus, it is necessary to examine the reasons for Congress' decisions to grant or withhold both federal

> jurisdiction and private remedies, something the court has not done.

Merrell Dow, 478 U.S. at 825-26 (emphasis added).

The possibility of incorrect interpretation and application of federal law by state courts initially led Congress to create a federal forum to adjudicate questions of federal law. The dissent noted that 28 U.S.C. Section 1331 provides a federal forum that specializes in federal law and the federal courts are more likely to properly interpret and apply federal law. As the state courts deal with federal questions less frequently, the federal courts are more skilled at interpreting and applying federal law and at defining congressional intent in enacting legislation. The dissent also noted

state courts may be hostile to federal rights.

It is important to note that enforcement of the FDCA is exclusively provided by the federal courts. Id., 478 at 830-831. "Congress passes laws in order to shape behavior, a federal law expresses Congress' determination that there is a federal interest in having individuals or other entities conform". Id. 478 U.S. at 828. The dissent interpreted Congress' decision to not provide a private remedy under FDCA as arising out of a concern for accurate implementation and coordination and enforcement of a statutory scheme. This interpretation supports a finding of Congressional intent to create federal jurisdiction over a state claim rather then an intent to exclude it. Clearly, implementation,

coordination and enforcement of a federal statutory scheme is furthered by a federal forum. In summery, the dissent found the majority's conclusion that if Congress intended no private cause of action also intended no federal jurisdiction to be unsupported.

3. Merrell Dow's Progeny

W. 14th St. Comm. Corp. v. 5 W. 14th Owners Corp., 815 F.2d. 188 cert. denied, 484 U.S. 850, 108 S.Ct. 151, 98 L.Ed.2d. 107 (2nd Cir. 1987), involved interpretation of the Condominium and Cooperative Abuse Relief Act, 15 U.S.C. Section 3601-16 (1982) (hereinafter "the Act"). The Act which provided a private cause of action, was enacted to protect tenants whose leaseholds were converted to condominiums or cooperatives. In W. 14th St. the tenants challenged contracts establishing a cooperative

seeking declaratory judgment and an injunction. The Second Circuit held that subject matter jurisdiction existed because the tenants had a private cause of action under the Act. However, the Court further noted that even if the Plaintiff's had no private right of action under the Act, "their state law claim encompasses a substantial federal question under the Act" and that this alone is enough to confer federal question jurisdiction. W. 14th St., 615 F.2d. at 193 (emphasis added).

The Second Circuit interpreted Merrell Dow as standing for the proposition that "any federal issue raised in a non-federal cause of action must be really substantial ... `the mere presence of a federal issue in a state cause of action does not automatically confer federal question

jurisdiction.'" Since the Plaintiffs' claims required a determination as to who had the right to possession. The Federal Act was critical to the action and a substantial federal question existed in that the federal statute was **necessary**.

Criticizing Merrell Dow, the Second Circuit noted that "the Supreme Court looked at substantiality with narrowed eyes in holding that where Congress has not provided Plaintiff with a private right of action under a federal statute, it must be concluded that a claimed violation of the statute as an element of a state cause of action is insufficiently substantial to confer federal question jurisdiction. Id. [Merrell Dow 106 S.Ct.] at 3236." West 14th St. Comm. Corp., 815 F.2d at 196.

The Court distinguished Merrell Dow noting that the Plaintiff in Merrell Dow merely "incorporated by reference a standard of conduct in a state negligence action". Id. at 196. Whereas, in West 14th St. Comm. Corp. the rights, responsibilities and relationships between the parties were dependent upon construction of federal law. This distinction was charaterized as a "qualitative" difference between Merrell Dow and W. 14th Street.

The District Court of New York following W. 14th St. Comm. Corp.'s lead rejected what it termed a "conclusory" approach; no federal cause of action; no federal jurisdiction. In City of New York v. Rapgal Associates, 703 F.Supp. 284 (1989), the City of New York sought to compel Rapgal to donate money to a

community organization. Pursuant to HUD Regulations the City could impose local regulations which would have to be met prior to the City's submission of a proposal on behalf of a builder to HUD. The City of New York required participants to agree to donate money to a local community organization. Rapgal by participating in the HUD program agreed to donate the money. Rapgal did not meet its obligation and the City sued to enforce the agreement. The City had no private right of action under the Department of Housing and Urban Development ("HUD") regulations to compel Rapgal to pay the money. The City argued Defendant's participation in the HUD program obligated it to comply with the City regulations adopted in response to the federal HUD statutes.

In analyzing the case the Court stated: "[i]t is unnecessary to determine whether the City based its suit on a federal or state cause of action. Instead, it is sufficient for this Court to find that a substantial federal question exists in this case." Id. at 287. In reaching its conclusion the court quoting W. 14th St. stated:

> ... **[In summary,] to determine whether the court has federal question jurisdiction to decide the case, the complaint must contain either a federal cause of action or a state cause of action embodying a substantial federal question.**

Rapgal, 703 F.Supp. at 287 quoting W. 14th St. 815 F.2d. at 192-193 (emphasis added).

The Court noted the federal government has a substantial interest in the HUD program and in ensuring that

local regulations designed to implement federal law are enforced. The rights and nature of the relationship between the parties and the duty owed by the Defendants to the Plaintiffs, **depended** upon interpretation of federal law. Thus, federal question subject matter jurisdiction existed.

Milan Express Co., Inc. v. Western Surety Co., 886 F.2d. 783 (6th Cir. 1989) concerned surety bonds that were created by federal law, required by federal statute, and administered by federal regulation. The Plaintiff did not argue it had a private cause of action under the federal statutes but that the federal statute was essential to its case.

28 U.S.C. Section 1337(a) establishes federal jurisdiction over disputes which "arise under" any act of

Congress regulating commerce. The Sixth Circuit noted that "arising under" in 28 U.S.C. Section 1337 is analogous to "arising under" in 28 U.S.C. Section 1331.

Relying on Franchise Tax Bd., Gully and Ford Motor Co. v. Transport Indemnity Co., 795 F.2d. 538 (6th Cir. 1986), the court noted that where a federal right created by a statute is essential to the cause of action, the case "arises under" federal law and federal jurisdiction exists. The Sixth Circuit was aware of the Merrell Dow decision but found it to be distinguishable on several grounds. First, the plaintiffs in Merrell Dow did not prove "that their case **depended necessarily** on a substantial question of federal law in that they simply alleged that the Defendant's violation

of the FDCA constituted some proof of negligence on one of its theories of megligence. Thus, the jury could have easily found the Defendant to be negligent, but not in violation of the FDCA." Milan, 886 F.2d at 788, whereas, the Plaintiff in Milan relied exclusively on federal law in its suit to recover on the bonds created, regulated, and required by federal law.

Furthermore, the Plaintiff in Merrell Dow did not demonstrate any compelling federal interest. The Milan court emphasized that regulation of commerce has historically been reviewed by the federal court, in part, due to the need for uniformity of interpretation which requires the "expertise" of a federal forum.

The Sixth Circuit concluded, the Merrell Dow decision should be applied

only in those cases where (1) the federal statute relied on is not essential to Plaintiff's case; (2) the Plaintiff has not alleged a right created by federal law; and, (3) the federal interest at stake is not compelling.

In each of these cases, W. 14th St., Rapgal, and Milan, the Plaintiffs were seeking enforcement of rights created by federal law. In Rapgal and Milan the Plaintiffs had no private cause of action, but did have a federal interest, that imposed a statutory duty on the other party. The fact that Plaintiff had no private right of action was not "outcome determinative" on the issue of federal question jurisdiction.

4. The parameters of the Merrell Dow opinion need clarification by this court.

The Petitioners urge this Court to grant Certiorari in order that this Court may clarify the limitations Merrell Dow imposes on federal question jurisdiction. Petitioner urges this Court to find that Merrell Dow only precludes federal question jurisdictions in those cases where no compelling federal interest is present; there is no federal law **essential** to the case; and no rights, (as distinguished from a cause of action), are created by federal law.

Merrell Dow did not explicitly or implicitly overrule Franchise Tax Bd. v. Constr. Laborers Vac. Trust, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d. 420 (1983), Smith v. Kansas City Title and Trust Co., 255 U.S. 180, 41 S.Ct. 243, 365 L.Ed. 577 (1920), or Gully v. First National Bank, 229 U.S. 109, 57 S.Ct.

96, 81 L.Ed. 70 (1936). In fact, this Court discussed these cases at great length. Additionally, in reaching its conclusion, the Merrell Dow Court applied the Franchise test. It determined that the Plaintiff's case did not present a substantial federal question upon which the Plaintiff's case depended. It was out of this finding that this Court made its seemingly overbroad statement that where there is no federal private right of action; there is no federal question jurisdiction. Surely, if such a simplified view was intended and this Court intended to overrule seventy-four years of caselaw reverting back to the Holmes test adopted in 1916, ("[A] suit arises under the law that creates the cause of action" American Well Works Co. v. Layne and Bowler Co., 241 U.S. 257,

36 S.Ct. 585, 60 L.Ed. 987 (1916).), this Court would have expressly overruled Smith, Gully and Franchise to the extent they applied to state causes of action filed in federal court.

5. Merrell Dow does not preclude a finding of federal question jurisdiction in this case.

Petitioners concede that they do not have a private cause of action under Titles 29 and 49 of the Code of Federal Regulations, and did not by their Complaints, attempt to create one. Nevertheless, federal subject matter jurisdiction still exists in that Title 49 is **essential** to Petitioners' claims; the federal interest is **compelling** and the Petitioners' have **a right created by federal law** to expect the Defendants to comply with federal regulations.

In Merrell Dow, the Plaintiff had alternative theories on which to base his negligence case. Thus, his federal interest was not substantial nor was his federal question essential to the success of his case.

The Petitioners herein have made one claim for relief in their complaints - - that Defendants were negligent in that they violated Titles 29 and 49 of the Code of Federal Regulations. They have made no other allegations of negligence, and given the facts of this case, there are no other acts of negligence on the part of the Defendants that can be advanced. A favorable interpretation of Title 49 is the key to the Petitioners' ability to succeed in this lawsuit. Title 49 is essential to Petitioners' case. It alone will determine if and in what

manner the chemical, chlordane, was to be packaged and labeled during transport. If a court determines Title 49 applies to chlordane, the Petitioners have stated an actionable claim for relief, grounded in negligence; but if it is determined Title 49 does not apply to the facts of the Petitioners' claims, the Petitioners will not prevail.

The Petitioners worked for United Postal Service and were in the process of transporting the chemical at the time of their injury. 49 U.S.C. Section 1802 (1975) states it was Congress' intent in passing Title 27 to protect the nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce." The United States District Court for South Carolina, in Williams v.

Hill Mfg. Co., Inc., 489 F.Supp. 20 (1980) held Congress' intent in passing 49 U.S.C. Section 1802 was to prevent harm "to persons as a result of accidents **while hazardous materials are in transport.**" Id. at 23. (emphasis added) The Plaintiffs herein were handling the subject containers of chlordane in order to transport them to their destination. Clearly, they were within the class of persons whom Congress intended to protect.

In Reynolds v. Murphy, 241 N.C. 60, 845 S.E.2d. 273 (1954), the North Carolina Supreme Court held that a violation of a statute which sets standards for the storage, handling and distribution of gasoline was negligence per se. The Court noted that as a general rule a violation of any statute enacted for the safety and protection of

the public constituted negligence per se; especially where such a violation carries with it a criminal penalty. Once negligence per se was established the North Carolina Supreme Court stated that the **sole** question became whether such negligence was the proximate cause of the injury. The fact that these statutes create no private cause of action for their violation does not negate the standard by which a party's conduct is judged.

When a statute enacted for the protection of a person is violated the standard of care set for others by the legislature is **absolute**. Byers v. Standard Concrete Products, Co., 268 N.C. 518, 151 S.E.2d. 38 (1966). The common law rule of reasonable care is no longer applicable. Carr v. Murrows

Transfer, Inc., 262 N.C. 550, 138 S.E.2d. 228 (1964).

> The violator is liable if injury or damage result, irrespective of how careful or prudent he has been in other respects. No person is at liberty to adopt other methods and precautions which in his opinion are equally or more effacious to avoid injury.
> **In short, where a statute . . . imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty, he is liable to those for whose protection or benefit it was imposed, for any injuries or damage of the character which the statute or ordinance was designed to prevent, and which was proximately produced by such neglect . .** Id. 138 S.E.2d. at 231.

The Plaintiffs had a right, as persons involved in the transport of hazardous materials, to expect that the Defendants would comply with their federal statutory duties and therefore

have a federally created right to hold the Defendants to that federal standard in their negligence action.

As in Milan, federal question jurisdiction exists in this case in that (1) Title 49 is essential to Plaintiffs' claims; (2) Title 49 created a federal right; and (3) there is a compelling federal interest at stake.

II. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED WHEN IT AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PETITIONERS' COMPLAINTS IN THAT THE APPLICABLE STATUTE OF LIMITATIONS HAD EXPIRED AND THE COURT FAILED TO PRESERVE PETITIONERS A RIGHT TO REFILE IN STATE COURT.

This issue was before the United States Court of Appeals for the Fourth Circuit. However, it chose not to address this issue in the Opinion it rendered on September 10, 1991.

Petitioners respectfully submit that this issue should be heard by Writ of Certiorari in that the District Court's actions constitute an abuse of discretion and the Fourth Circuit's affirming of that decision is in conflict with decisions of this Court and other Circuit Courts.

As a general rule there is no abuse of discretion unless there has been a manifest abuse of discretion resulting in prejudice to one of the parties. 5A C.J.S. Appeal & Error Section 1583, p.24-25 (1958).

> Great weight is, accordingly, given to the judgment of the trial court on discretionary matters; but it is not necessarily conclusive, and the general rule above stated does not give the trial judge an entirely free hand in discretionary matters. The discretion involved is not an arbitrary, absolute one, but a judicial discretion which must be exercised with legal lines in accordance with

> fixed principles of law, its exercise is subject to review and revision for plain abuse resulting in prejudice to the complaining party; if the party goes beyond the confines of its discretionary latitude, its action is considered not as discretionary, but as erroneous." Id. 5A. C.J.S. at p. 27-28

Petitioners concede if this Court determines there is no federal question subject matter jurisdiction, this Court must dismiss Petitioners' claim. However, Petitioners strongly argue that the facts in this case mandate a provision in the order whereby a right to refile in State Court is preserved.

As the applicable statute of limitations, N.C.G.S. 1-52, requires that an action such as Petitioners' be filed within three (3) years from the date of its accrual, absent judicial intervention the Petitioners'claims

will have become time barred on September 2, 1989. The Petitioners timely filed this action in the U.S. District Court for the Eastern District of North Carolina on September 1, 1989. The District Court's Order dismissing Petitioners cases was entered on August 14, 1990. In its Order, the District Court failed to indicate whether its dismissal of Petitioners' claims was with or without prejudice or to provide a provision whereby the Plaintiffs right to refile in state court was preserved.

The Fourth Circuit has recently held that Rule 41(b) of the North Carolina Rules of Civil Procedure (hereinafter the "savings provision"), applies in those cases where a Plaintiff who stipulates to a voluntary dismissal without prejudice of a timely filed action in a federal court sitting in

diversity jurisdiction and applying North Carolina substantive law when that Plaintiff refiles his action in a North Carolina state court; thus, invoking a one year savings provision. The Petitioners herein refiled their action in state court on October 8, 1991. The Defendants moved to dismiss on the ground that the statute of limitations has expired and the state action was dismissed on said ground on December 3, 1991.

In that the United States District Court failed to make provisions in its Order whereby the Petitioners would have the right to refile in state court despite the expiration of the applicable statute of limitations the Petitioners have been greatly prejudiced. This Court has held under similar facts that such a result

is inequitable and will not be enforced by the courts.

In Burnett v. New York Central Railroad Company, 380 U.S. 424, 13 L.Ed.2d 941, 85 S.Ct. 1050 (1965), this court addressed whether a federal statue of limitations was tolled upon the filing of suit in a state court which had jurisdiction but was an improper venue. The Plaintiff's state court action was dismissed for improper venue and Plaintiff refiled in federal court eight days later. His federal court case was dismissed on the ground that the statute of limitations had expired.

In holding that the federal statute of limitations was tolled, this Court noted that the purpose of a statute of limitation is to ensure fairness to the Defendant and to promote justice by avoiding stale claims. "The theory is

that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitations. . ." Id. 380 U.S. at 428 (emphasis added). The court further recognized that this policy of protecting the Defendant "is frequently outweighed. . . where the interests of justice require vindication of the Plaintiff's rights." The Plaintiff in Burnett (1) filed his claim in the state courts within the statute of limitations period; (2) served the Defendant with service of process; and (3) failed to file in federal court because he felt that his state action was sufficient. Based on these facts, the Court held that the policy underlining the application of a statute of limitations was not compromised by a finding the statute was tolled because Defendant was

on notice that Plaintiff was asserting a claim against him. The Court emphasized that the Plaintiff showed due diligence in complying with the statute of limitations by timely filing his action in state court. **If the Plaintiff mistakenly files in an improper venue the interests of justice may require that the case be transferred in order that the Plaintiff will not be penalized for a mere technicality.** This Court held that the federal statute of limitations was tolled for the period of time from the date of dismissal of the state action until the order of dismissal became final (either by the running of the time to file an appeal or entry of a final judgment on appeal.) As the Plaintiff in Burnett filed his action in federal court before expiration of the time for appeal, the

federal statute of limitations did not bar Plaintiff's federal court action.

The Petitioners herein acted with due diligence in filing their case in the federal court within the time period prescribed by statute. The Defendants have not been prejudiced simply because Petitioners filed in federal court instead of state court. The Defendants received notice of the nature of Petitioners claims within the statutory period. Further, the interests of justice demand that Petitioners claim be heard on its merits.

As shown below, the First, Fifth, Seventh, Ninth, Eleventh, and D.C. Circuit Courts have recognized the unique importance of an expired statute of limitations in the determination of whether or not to dismiss and if so, what provision should be made to

preserve the Plaintiff's state cause of action in state court. As shown by the opinions cited below, the various Circuits have preserved the Plaintiff's right to refile in state court by several different avenues. These include: (1) a dismissal "without prejudice" in order that an applicable savings statute will save the claim where such a state statute is applicable; (2) an order remanding the case to state court where remand is available; (3) an order directing the Plaintiff to refile in state court and requiring the Defendant to waive any statute of limitations defense prior to dismissal of the federal action; and (4) an order finding that the statute of limitations was tolled upon the filing of the action in federal court.

The District Court herein could have entered an order directing the Plaintiff to refile in state court and requiring the Defendants to waive their statute of limitations defense prior to the dismissal of the federal claim. As the District Court's failure to do so, Petitioners allege an abuse of discretion.

Where remand was available, the First Circuit has held that where a statute of limitations may bar a subsequent action by the Plaintiff, considerations of fairness dictate that when a case is found to lack federal jurisdiction following removal from a state court, remand, rather than dismissal is the proper court action. Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d. 208 (1st. Cir. 1987).

Where state claims were before the Court under pendent jurisdiction and federal claims were disposed of by dismissal or otherwise, the Fifth, Seventh, Ninth, Eleventh, and D.C. Circuits, have found abuse of discretion when the state law claims were not preserved. These Circuit Courts have used various procedures to assure that the Plaintiff's state cause of action was not lost.

In Duckworth v. Franzen, 780 F.2d. 645, cert. denied 479 U.S. 816, 107 S.Ct. 71, 89 L.Ed.2d. 262 (7th Cir. 1985) and in O'Brian v. Continental Illinois Nat. Bank & Trust Co., 593 F.2d. 54 (7th Cir. 1979), the Seventh Circuit found it was an abuse of discretion for the District Court Judge to dismiss Plaintiff's pendent state law claims following dismissal of

Plaintiff's federal claim in that the statute of limitations would bar Plaintiff from filing the state claims in state court and the Illinois "savings" statute did not save the claim.

The Fifth Circuit has held that a District Court "may return and adjudicate ancillary state law claims after a pretrial settlement of the main federal action if a dismissal would unduly prejudice the parties." Joiner v. Diamond M. Drilling Co., 677 F.2d. 1035, 1043 (5th Cir. 1982). For example, if the applicable statute of limitations has run during the pendency of the state claim in federal court, a dismissal might deprive the parties of any forum. Id. In such a case, a federal court would be justified in retaining jurisdiction over the ancillary state law claims. Id.

The Ninth Circuit in Danner v. Himmelfarb, 858 F.2d 515 cert. denied, 490 U.S. 1067, 109 S.Ct. 2067, __ L.Ed.2d. ____ (9th Cir. 1988) recognized that the court should consider several factors including fairness to the parties, **particularly the expiration of a statue of limitations**, in deciding whether or not to exercise jurisdiction over pendent state claims following dismissal of the federal claim. It noted that the Plaintiff therein did not assert that a statute of limitations had expired but rather simply asserted that it would be inconvenient to pursue his claims in state court. Id. The Ninth Circuit held this did not support any finding of abuse of discretion in dismissing the state claims. Id.

The Eleventh Circuit in Quality Foods de Centro America, S.A. v. Latin

American Agribusiness Development Corp., 711 F.2d. 989 (11th Cir. 1983), held that the District Court must be given the opportunity to consider the possibility that a Plaintiff's pendent state claims will be time barred by a statute of limitations, even where the Plaintiff does not bring the potential problem to the attention of the District Court prior to appeal. Quoting Pharo v. Smith, 625 F.2d. 1226 (5th Cir. 1980), the Eleventh Circuit noted that whether a Plaintiff's claims will be time barred is a factor, if not a **determinative** factor, to consider when deciding whether or not to retain pendent jurisdiction following the dismissal of the federal claim.

The District of Columbia Circuit Court in Financial Gen. Bankshares, Inc. v. Metzgar, 680 F.2d. 768 (D.C.Cir.

1982), reversed the District Courts ruling on the merits of Plaintiff's pendent state claims but directed the District Court to not dismiss Plaintiff's state claims until Plaintiff had re-filed in state court and the Defendant had waived any statute of limitations defense in order to "[a]ssure that Plaintiff may avail itself of the local forum." Id. at 778.

Recognizing the importance of Plaintiffs right to bring his pendent state claims in state court and the real possibility that such would be barred by the statute of limitations, the District Court sitting in the Northern District of California dismissed Plaintiff's claims upon the condition that the Defendant waive any defense arising from the statute of limitations. Brewer v. City of El Cerrito, 666 F.Supp. 1346

(N.D.Cal. 1987).

The District Court in dismissing Plaintiffs' claims herein for lack of subject matter jurisdiction without preserving the Plaintiffs' right to refile their action in state court is an abuse of discretion.

CONCLUSION

Federal question jurisdiction exists in this case. Merrell Dow should not be interpreted as extinguishing federal question jurisdiction in all cases when no federal private right of action exists whether or not the application of law is essential to Petitioners' claim; a federal right is created by the federal law; and/or a compelling federal interest exists. Such an interpretation is inconsistent with the interests of fairness and judicial quality. Some cases should be

heard in a federal forum despite the fact no private federal cause of action exists. This case is one such case. Federal law; to wit: Title 49 is essential to Petitioners claims if they are to succeed. The Petitioners have a federal right created by Title 49 to expect Defendants to follow federal mandates issued for their protection. Surely the handling of toxic substances that are shipped through interstate commerce is of compelling interest to the federal government. The ambiguity created as to the importance of Merrell Dow, by the Circuit Opinions of Milan, Ripgal, and W. 14th St. should be clarified by this Court and as such Petitioners respectfully request that Writ of Certiorari be issued.

Furthermore, the Fourth Circuit's affirmation of the District Court's

order is inconsistent with this Court's opinion in Burnett and is also inconsistent with opinions of the First, Fifth, Seventh, Ninth, Eleventh, and D.C. Circuit Courts. Writ of Certiorari should issue in this case due to these inconsistencies as well as the critical importance of clarity in jurisdictional issues in order that litigants may not be deprived of a trial on the merits of their case due to a procedural technicality.

Respectfully submitted this the _ day of December, 1991.

SHIPMAN & LEA

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APPENDIX

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N.C. Gen. Stat. Section 1-1A, Rule 41 . . . . . App. 5

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United States District Court Eastern District of North Carolina Wilmington Division Order Dismissing Petitioner Clark's claim . . . . . App. 9

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28 U.S.C. Section 1254.

Court of appeals; certiorari; certified questions.

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorari granted upon the Petition of any party to any civil or criminal case, before or after rendition of judgment or decree; ...

...

28 U.S.C. Section 1254 (1988).

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28 U.S.C. Section 1331.

Federal Question.

(a) The District Courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. 28 U.S.C. Section 1331 (1976).

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49 U.S.C. Section 1801.

Congressional declaration of policy.

It is declared to be the policy of Congress in this chapter to improve the regulatory and enforcement authority of the Secretary of Transportation to protect the Nation adequately against the risks of life and property which are inherent in the transportation of hazardous materials in commerce.

49 U.S.C. Section 1801 (1975).

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49 U.S.C. Section 1804.

Regulations governing transportation of hazardous materials.

(a) The Secretary may issue, in accordance with the provisions of section 553 of Title 5 including an opportunity for informal oral

presentation, regulations for the safe transportation in commerce of hazardous materials,. Such regulations shall be applicable to any person who transports, or causes to be transported or shipped, a hazardous material, or who manufactures, fabricates, makers, maintains, reconditions, repairs, or tests a package or container which is represented, marked certified, or sold by such person for use in the transportation in commerce of certain hazardous materials. Such regulations may govern any safety aspect of the transportation of hazardous materials which the Secretary deems necessary or appropriate, including, but not limited to, the packing, repacking, handling, labeling, marking, placarding, and routing (other than with respect to pipeline) of hazardous materials, and

the manufacture, fabrication, marking, maintenance, reconditions, repairing, or testing of a package or container which is represented, marked, certified, or sold by such person for use in the transportation or certain hazardous materials.

(b) In addition to other applicable requirements, the Secretary shall consult and cooperate with representatives of the Interstate Commerce Commission and shall consider any relevant suggestions made by such Commission, before issuing any regulations with respect to the routing of hazardous materials. Such Commission shall, to the extent of its lawful authority, take such action as is necessary or appropriate to implement any such regulations.

(c) No person shall, by marking or otherwise, represent that a container or package for the transportation of hazardous materials is safe, certified, or in compliance with the requirements of this Act, unless it meets the requirements of all applicable regulations issued under this Act.

N.C. Gen. Stat. Section 1-1A, Rule 41.

Dismissal of Actions.

(b) Voluntary Dismissal; Effect thereof. For failure of the plaintiffs to prosecute or to comply with these rules or any order of the Court, a defendant may move for dismissal of an action or of any claim therein against him. After the Plaintiff, in an action tried by the Court without a jury, has completed the presentation of his

evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the Plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section any any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an

adjudication upon the merits. If the court specifies that the dismissal of an action commenced within the time prescribed therefore, or may claim therein, is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal.

N.C. Gen. Stat. Section 1-52.

Three years.

Within three years an action -

(16) Unless otherwise provided by statute, for personal injury or physical damage to claimants' property, the cause of action, except in causes of actions referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property

becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

NO. 89-81-CIV-7-F

KENNETH R. CLARK,	:	
	:	
Plaintiff,	:	
	:	
v.	:	ORDER
	:	
VELSICOL CHEMICAL CORPORATION and FORSHAW CHEMICAL, INC.,	:	
	:	
Defendants.	:	

STATEMENT OF THE CASE

Plaintiff brings this action seeking to recover for personal injuries which he allegedly suffered due to exposure to the substance chlordane, which is an ingredient in the insecticide Gold Crest C-100, manufactured by defendant Velsicol Chemical Corporation ("Velsicol").

Plaintiff alleges that his exposure to the substance was proximately caused

by "the negligence of the Defendant [sic] and/or their failure to comply with the mandatory packaging, shipping, and labeling requirement of Titles 29 and 49 of the Code of Federal Regulations..." Plaintiff's allegations of federal jurisdiction state that "Jurisdiction is based upon diversity of citizenship among the Plaintiff and Defendant Velsicol, and involves a federal question, to wit: violation of Titles 29 and 49 of the Code of Federal Regulations."

This mater is now before the court on defendant Forshaw Chemical, Inc.'s ("Forshaw") Motion to Dismiss.

STATEMENT OF THE FACTS

The only uncontroverted facts at this stage of the proceedings are that Forshaw placed a sealed 5-gallon drum of Gold Crest C-100 insecticide,

manufactured by Velsicol, with the United Parcel Service ("UPS") for delivery to Dodson Brothers Exterminating Company, Inc., in Wilmington, North Carolina. Some of the insecticide subsequently leaked from that drum due to, as yet, undetermined circumstances. Plaintiff, at that time an employee of UPS, allegedly came into contact with the insecticide after it leaked, and suffered injuries from the same.

DISCUSSION

In this action, plaintiff alleges that this court has subject matter jurisdiction due to (a) the existence of a federal question, and (b) federal diversity jurisdiction.

Plaintiff alleges that this court has federal question jurisdiction in the case sub judice because defendants

violated Titles 29 and 49 of the Code of Federal Regulations. Title 29 of the Code of Federal Regulations concerns the Occupation Safety and Health Administration ("OSHA"). 29 C.F.R. 1910.2. Standards promulgated by OSHA regulate the workplace and are applicable only to employer/employee situations. Id. At the time plaintiff was allegedly injured by the chlordane, plaintiff was an employee of UPS in Wilmington, North Carolina, and thus Title 29 is inapplicable to plaintiff's present lawsuit.

Title 49, the Hazardous Materials Transportation Act, articulates packaging standards for various substances, including insecticides like Gold Crest C-100. Defendant Forshaw argues that "Title 49 expressly fails to impose any standards on the class of

substances which includes Gold Crest C-100," and is thus "wholly inapplicable to the instant situation." The court need not decide this issue, however, because the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801-13, creates no implied private right of action. Burrough of Ridgefield v. New York Susquehanna & Western R.R., 810 F.2d. 57 (3rd Cir. 1987).

Thus, no federal question jurisdiction exists in the case sub judice.

As concerns Plaintiff's contention that jurisdiction is also proper based upon plaintiff's diversity with Velsicol, the court finds this argument to be without merit.

Plaintiff states in his complaint that he is a citizen and resident of North Carolina, and that Velsicol is a

corporation organized and existing under the laws of the State of Illinois, with its principal office and place of business located in Illinois. However, as plaintiff readily admits in his complaint, Forshaw is also a citizen of North Carolina. It is well settled that the statutory grant of diversity jurisdiction contained in 28 U.S.C. Section 1332 is inapplicable where there is not complete diversity between the plaintiff and defendants in the lawsuit. Strawbridge v. Curtiss, 3 Cranch (7 U.S.) 267 (1806).

In the instant case, plaintiff's cause of action fails to allege complete diversity and, therefore, this court has no federal diversity jurisdiction pursuant to 28 U.S.C. Section 1332.

CONCLUSION

For the foregoing reasons, this court DISMISSES the instant lawsuit[1] due to the absence of federal jurisdiction.[2]

SO ORDERED.

This the 14th day of August, 1990.

JAMES C. FOX
United States District Judge

---

[1] The court notes that defendant Velsicol has not filed a motion to dismiss, but, because a federal court may examine its jurisdiction at any time, the court believes that dismissal of this case as to all parties is appropriate at this time.

[2] In addition, insofar as plaintiff's complaint seeks recovery under Titles 29 and 49 of the Code of Federal Regulations, the court GRANTS defendant Forshaw's motion to dismiss said complaint for failure to state a claim upon which relief may be granted.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

NO. 89-82-CIV-7-F

THOMAS O. RHYNE,	:	
	:	
Plaintiff,	:	
	:	
v.	:	ORDER
	:	
VELSICOL CHEMICAL CORPORATION and FORSHAW CHEMICAL, INC.,	:	
	:	
Defendants.	:	

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PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

KENNETH R. CLARK,

Plaintiff-Appellant,

v. No. 90-1841

VELSICOL CHEMICAL CORPORATION;
FORSHAW CHEMICAL, INCORPORATED,

Defendants-Appellees.

THOMAS O. RHYNE,

Plaintiff-Appellant,

v. No. 90-1842

VELSICOL CHEMICAL CORPORATION;
FORSHAW CHEMICAL, INCORPORATED,

Defendant-Appellees.

Appeals from the United States
District Court
for the Eastern District of
North Carolina, at Wilmington.
James C. Fox, Chief District Judge.
(CA-89-81-7-CIV, CA-89-89-7-CIV)

Argued: March 4, 1991

Decided: September 10, 1991

Before SPROUSE and WILKINSON,
Circuit Judges, and

MacKENZIE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Sprouse and Senior Judge MacKenzie joined.

COUNSEL

ARGUED: Gary Keith Shipman, SHIPMAN, LEA & ALLARD, Wilmington, North Carolina, for Appellants, Katharine Ruth Latimer, SPRIGGS & HOLLINGSWORTH, Washington, D.C., for Appellees. **ON BRIEF:** Jennifer L. Umbaugh, SHIPMAN, LEA & ALLARD, Wilmington, North Carolina, for Appellants. Joe G. Hollingsworth, Barbara A. Milnamow, SPRIGGS & HOLLINGSWORTH, Washington, D.C.; Mark Stanton Thomas, Richard Merritt Lewis, Elizabeth Davenport Scott, MAUPIN, TAYLOR, ELLIS & ADAMS,

P.A., Raleigh, North Carolina, for Appellee Velsicol Chemical; Dennis Lorenz Guthrie, Robert K. Trobich, MURCHISON, GUTHRIE, DAVIS & HENDERSON, Charlotte, North Carolina, for Appellee Forshaw Chemical.

OPINION

WILKINSON, Circuit Judge:

This case presents a question of the boundaries of federal jurisdiction. The plaintiffs are two United Parcel Service employees who were allegedly injured by a leaking package of insecticide. They maintain that they can bring their negligence action in federal court because their claim involves a substantial federal question - that is, whether federal regulations covering the packaging and handling of hazardous substances apply to the particular insecticide. Because

plaintiffs concede they have no federal cause of action and because the federal regulations are relevant only through incorporation into the state negligence action, we lack jurisdiction over their lawsuit. See Merrell Dow Pharmaceuticals v. Thompson, 478 U.S. 804 (1986).

I.

On September 2, 1986, Kenneth Clark and Thomas Rhyne were transporting a five gallon drum of the chemical insecticide chlordane to an exterminator in North Carolina as part of their employment with the United Parcel Service. They allege that the drum began leaking and that, in their attempts to repair the container, they were exposed to the toxic chemical and have suffered permanent damage therefrom.

Clark and Rhyne brought suit in September, 1989 in the United States District Court for the Eastern District of North Carolina against Velsicol Chemical Corporation, which manufactured the chlordane, and Forshaw Chemical, Inc., which distributed it in North Carolina. They charged that defendants were negligent in that the packaging and labeling of the chemical did not comply with federal regulations governing the packaging, shipping and labeling of hazardous materials. See 29 C.F.R. pts. 1900-1999 (1990); 49 C.F.R. pts. 171-180 (Hazardous Materials Regulations)(1990). The defendants responded that the federal court lacked jurisdiction over the matter and moved the court to dismiss the complaint.

On August 14, 1990, the district court dismissed plaintiffs' complaints

on the ground that it lacked jurisdiction. Diversity jurisdiction was not available because plaintiffs and defendant Forshaw were all North Carolina citizens. See 28 U.S.C. Section 1332. Nor did the court find that the case raised a significant federal question. See 28 U.S.C. Section 1331. The relevant chapter of Title 29 of the Code of Federal Regulations (CFR) relates to the Occupational Safety and Health Administration (OSHA) and thus concerns standards governing the workplace and the relationship between employers and employees. Because the plaintiffs were employees of UPS and not of the defendants, the court ruled Title 29 was inapplicable. Title 49 of the CFR does impose standards for packaging various hazardous substances. The court held, however, that the

Hazardous Material Transportation Act, codified as amended at 49 U.S.C. Section 1801-1813, did not create an implied private right of action, See Borough of Ridgefield v. New York Susquehanna & W. R.R., 810 F.2d 57 (3rd Cir. 1987); thus no federal question arose under Title 49.

Clark and Rhyne now appeal the dismissal of their lawsuits.

II.

Plaintiffs concede that they have no implied private rights of action under Titles 29 and 49. They nevertheless maintain that their complaint raises a substantial federal question. See 28 U.S.C. Section 1331. Plaintiffs argue that their case "arises under the Constitution, laws, or treaties of the United States" because the only issue it presents is whether

chlordane is a hazardous material to which the regulations in Title 49 of the CFR apply. Because resolution of this issue requires a technical examination of federal law and because regulation of commerce has historically been enforced in federal court, plaintiffs contend that federal courts are in the best position to make this determination.

The Supreme Court rejected a similar argument in Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986). In Merrell Dow, plaintiffs brought suit against the manufacturer and distributor of the drug Bendectin, charging that the drug caused multiple birth deformities when mothers ingested it during pregnancy. One of the negligence counts alleged that Bendectin was "misbranded" in violation of the Food, Drug, and Cosmetic Act

(FDCA), 21 U.S.C. Section 301 et. seq., because the label failed to warn of the drug's dangers. The plaintiffs did not allege that they had a federal cause of action under the FDCA, but rather that jurisdiction was proper because the case raised a substantial federal question in a state-created cause of action.

The Supreme Court held that federal jurisdiction did not lie. Since Congress had apparently chosen not to create federal private remedies, the Court held that "the presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system." 478 U.S. at 814. The Court also dismissed the contention that a powerful federal interest in uniform interpretation of federal laws gave rise

to jurisdiction, noting that it could review the disposition of a decisive federal issue in a state cause of action even if no original district court jurisdiction existed. Id. at 816. In sum, the Court concluded that:

> a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the Constitution, laws, or treaties of the United States."
> Id. at 817 (citing 28 U.S.C. Section 1331).

We believe that the present case is not distinguishable from Merrell Dow. Plaintiffs concede they have no federal cause of action and argue that under North Carolina law a violation of any statute enacted for the safety and protection of the public constitutes

negligence per se. See Carr v. Murrows Transfer, Inc., 138 S.E.2d 228 (N.C. 1964). Assuming arguendo that plaintiffs' view is the correct one, questions of causation and remedy, for example, would still be ones of state law, since no private federal action has been provided. Application of the particular federal statute in this case would remain but an element in plaintiffs' state negligence action and cannot give rise to federal question jurisdiction. 478 U.S. at 817. Plaintiffs' argument that the federal courts are the best stituated to rule on a federal issue has already been rejected as a justification for federal jurisdiction in Merrell Dow.

Plaintiffs argue that Merrell Dow is not controlling because the plaintiffs there alleged numerous

alternative theories of negligence and thereby rendered the federal question non-essential. See Franchise Tax Bd. of Calif. v. Construction Laborers Vacation Trust for S. Calif., 463 U.S. 1 (1983). Clark and Rhyne protest that the federal issue here, by contrast, is essential since they assert only a single claim that defendants were negligent because they violated federal regulations. We find this to be a distinction without a difference. The decision in Merrell Dow turned on the lack of congressional intent to create a private cause of action, and not on the number of theories of negligence:

> The significance of the necessary assumption that there is no federal private cause of action thus cannot be overstated. For the ultimate import of such a conclusion, as we have repeatedly emphasized, is that is would flout congressional intent to

> provide a private federal remedy for the violation of the federal statute. We think it would similarly flout, or at least undermine, congressional intent to conclude that the federal courts might nevertheless exercise federal-question jurisdiction and provide remedies for violations of that federal statute solely because the violation of the federal statue is said be a "rebuttable presumption" [of negligence] or a "proximate cause" under state law, rather than a federal action under federal law.

478 U.S. at 812.

Nor do we believe that the cases on which plaintiffs rely support their cause. In Milan Express Co. v. Western Surety Co., 886 F.2d 783 (6th Cir. 1989), the court addressed motor carriers' direct rights under Interstate Commerce Commission bonds that were "created on federal forms, administered under federal regulations, and required

by a federal statute.", Id at 787. The court asserted jurisdiction because the motor carriers were arguing that their rights were created by federal law, whereas the plaintiffs in Merrell Dow were claiming that the alleged violation of federal regulations was merely evidence of negligence and not the actual basis of recovery. 886 F.2d at 788-89. In West 14th St. Commercial Corp, v. 5 W. 14th Owners Corp., 815 F.2d 188 (2nd Cir. 1987), the Second Circuit held that the plaintiffs were pursuing a federal cause of action which was expressly provided by the Condominium and Cooperative Abuse Relief Act, 15 U.S.C. Section 3601-3616. The court did state that it also would have found a substantial federal question in the absence of a federal cause of action because the rights and relationships of

the owners and tenants in that case were created by federal law. The court distinguished Merrell Dow, however, as a case where "the federal statute was merely incorporated by reference as a standard of conduct in a state negligence action." 815 F.2d at 196.

Plaintiffs cannot by artful pleading transform their state negligence action into a substantial federal question. Federal courts cannot create indirectly what Congress did not provide directly - namely, a federal forum for the privately asserted federal violations in this case. We therefore affirm the judgment of the district court dismissing the action for lack of jurisdiction. Because the dismissal is not on the merits, it is to be without prejudice to any action plaintiffs may bring in state court. See Fed. R. Civ.

P. 41(b); Costello v. United States, 365 U.S. 265, 286 (1961).

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

Supreme Court, U.S.
FILED
JAN 13 1992
OFFICE OF THE CLERK

No. 91-1023

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

KENNETH R. CLARK;
THOMAS O. RHYNE,
Petitioners,

v.

VELSICOL CHEMICAL CORPORATION;
FORSHAW CHEMICAL, INCORPORATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals, following the express holding of *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986), correctly held that 13 U.S.C. § 1331 did not confer federal question jurisdiction where a plaintiff merely incorporated by reference a federal standard of care in a state negligence suit?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1023

KENNETH R. CLARK;
THOMAS O. RHYNE,
Petitioners,

v.

VELSICOL CHEMICAL CORPORATION;
FORSHAW CHEMICAL, INCORPORATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

OPINIONS BELOW

The two August 14, 1990 opinions of the United States District Court, Eastern District of North Carolina, which dismissed petitioners' identical complaints because the state negligence claims presented did not confer federal subject matter jurisdiction, are unreported and are reproduced in full in the Appendix of petitioners' brief at 9-23.

The September 10, 1991 opinion of the Fourth Circuit Court of Appeals affirming the dismissals on the ground that no federal subject matter jurisdiction existed is reported at 944 F.2d 196 (4th Cir. 1991).

COUNTER-STATEMENT OF THE CASE

The day before the period of limitations on their claims expired, Petitioners Kenneth R. Clark ("Clark") and Thomas O. Rhyne ("Rhyne") each filed a materially identical complaint against respondents Velsicol Chemical Corporation ("Velsicol") and Forshaw Chemical, Incorporated ("Forshaw") in the United States District Court for the Eastern District of North Carolina. Clark and Rhyne alleged a single count of negligence against Velsicol and Forshaw, claiming that the companies had breached a duty of care by failing to comply with the packaging, labeling, and shipping requirements of Code of Federal Regulations Title 49 (regulations implementing the Hazardous Materials Transportation Act, 49 U.S.C.App. §§ 1801-1813 ("HMTA")).[1]

On August 14, 1990, the District Court dismissed Clark and Rhyne's complaints "due to the absence of federal jurisdiction" and "for failure to state a claim upon which relief may be granted." The District Court found that petitioners' reference to the HMTA regulations as part of their state negligence suit did not give rise to federal question jurisdiction because HMTA does not permit a federal private right of action.

Clark and Rhyne appealed the District Court's dismissal, and, at Velsicol's request, the Fourth Circuit con-

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[1] Clark and Rhyne added a cursory allegation that respondents violated Title 29 of the Code of Federal Regulations as well. However, Title 29 codifies Occupational Safety and Health Act standards regulating the workplace, and is applicable only in an employer/employee context. 29 C.F.R. § 1910.5(d) (1989). At the time Clark and Rhyne allegedly were injured, they were employed by UPS, not Velsicol or Forshaw. Pet. at 3. Title 29 regulations, therefore, are inapplicable here.

solidated their appeals. The Fourth Circuit affirmed the dismissal: "Because plaintiffs concede they have no federal cause of action and because the federal regulations are relevant only through incorporation into the state negligence action, we lack jurisdiction over their lawsuits." *Clark v. Velsicol Chem. Corp.*, 944 F.2d 196 (4th Cir. 1991).

Petitioners seek certiorari following the Fourth Circuit's published affirmance of the District Court's final judgment.

SUMMARY OF THE ARGUMENT

This Court has flatly concluded that, in the absence of a federal private right of action, complaints which allege a violation of a federal labeling regulation as an element of a state negligence cause of action do *not* state claims arising under the Constitution, laws, or treaties of the United States so as to confer federal question jurisdiction upon a district court. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986). Clark and Rhyne concede they have no private right of action under HMTA. An alleged violation of HMTA regulations as an element of Clark and Rhyne's state law negligence claims, therefore, did not give rise to subject matter jurisdiction in the federal courts.

Petitioners have shown no "special and important reasons" for the Court to grant certiorari. S. Ct. R. 10.1. The Fourth Circuit's decision affirming dismissal of the complaints is not in conflict with any other circuit court decision; to the contrary, the Fourth Circuit, like every other federal circuit which has considered the issue, merely considered and applied *Merrell Dow* as part of its jurisdictional evaluation. The Fourth Circuit found this case "not distinguishable" from *Merrell Dow* and properly concluded it lacked jurisdiction.

In addition, the Fourth Circuit properly upheld the District Court's broad discretion to dismiss Clark and

Rhyne's complaints without specifying whether Clark and Rhyne could re-file in North Carolina state court, and properly left to the North Carolina state courts the issue of whether the North Carolina Rule 41(b) operated to "save" petitioners' claims.

REASONS FOR DENYING CERTIORARI

I. THERE IS NO WIDESPREAD SPLIT OF APPELLATE AUTHORITY INTERPRETING THE DISPOSITIVE PRECEDENT *MERRELL DOW PHARMACEUTICALS, INC. v. THOMPSON*, 478 U.S. 804 (1986).

This Court held only six years ago that:

> a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the Constitution, laws, or treaties of the United States."

Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 817 (1986) (citing 28 U.S.C. § 1331). Since then, notwithstanding petitioners' cavalier objections that the rule is "overbroad" and regressive, Pet. at 36, *Merrell Dow* has received widespread, even application. Both courts of appeal and district courts—from every federal circuit which has jurisdiction under 28 U.S.C. § 1331—have considered and applied *Merrell Dow*, and the cases reveal no conflict in interpretation.

First Circuit: *E.g., Nashoba Communications Ltd. Partnership No. 7 v. Town of Danvers*, 893 F.2d 435 (1st Cir. 1990) (in accord with *Merrell Dow*, allegation of violation of Cable Communications Policy Act insufficient to confer federal jurisdiction over state law contracts dispute because no private right of action under the Act); *Rodriguez v. SK & F Co.*, 833 F.2d 8 (1st Cir. 1987) (per curiam) (no federal jurisdiction over plaintiff's state wrongful discharge case involving Food, Drug

& Cosmetic Act violation because no private right of action under FDCA) (citing *Merrell Dow*).

Second Circuit: *E.g., J.A. Jones Constr. Co. v. City of New York*, 753 F. Supp. 497 (S.D.N.Y. 1990) (no federal jurisdiction over state breach of contract claim where plaintiffs merely allege that violation of federal procurement regulations was the breach) (applying *Merrell Dow*); *Banco de Ponce v. Hinsdale Supermarket Corp.*, 663 F. Supp. 813 (E.D.N.Y. 1987) (no federal jurisdiction over state fraud claim where violation of federal regulations alleged as part of fraudulent scheme) (citing *Merrell Dow*).

Third Circuit: *E.g., Glass Molders Int'l Union v. Wickes Cos.*, 707 F. Supp. 174, 178-81 (D. N.J. 1989) (allegations of violation of federal law as element of state tortious interference claim did not support federal jurisdiction; "Supreme Court has consistently reminded the courts of the 'long-settled understanding that the mere presence of a federal issue in a state cause of action does not automatically confer federal question jurisdiction' ") (citing *Merrell Dow*).

Fourth Circuit: *E.g., Clark v. Velsicol Chem. Corp.*, 944 F.2d 196 (4th Cir. 1991) (case below) (state negligence suit incorporating standard of care in HMTA does not create federal jurisdiction) (applying *Merrell Dow*).

Fifth Circuit: *E.g., Willy v. Coastal Corp.*, 855 F.2d 1160, 1168 (5th Cir. 1988) (existence of a "private, federal remedy . . . [is] a necessary predicate to determining that the presence of a federal element in a state-created cause of action result[s] in that cause of action being one which ar[ises] under federal law") (citing *Merrell Dow*); *Oliver v. Trunkline Gas Co.*, 796 F.2d 86, 89 (5th Cir. 1986) (citing *Merrell Dow* for proposition that no federal question jurisdiction exists over "cases in which the state claim is based on a violation of a federal statute for which Congress has declined to provide a pri-

vate, federal cause of action"); *Fabrique, Inc. v. Corman*, 813 F.2d 725, 725-26 (5th Cir. 1987) (bankruptcy element in leasehold claim does not give rise to federal jurisdiction because *Merrell Dow* "rejected the 'ingredient' test of federal question jurisdiction").

Sixth Circuit: *E.g., Miller v. Norfolk and W. Ry. Co.*, 834 F.2d 556 (6th Cir. 1987) (no federal jurisdiction over state claim for defamation where federal statute alleged as component of claim; *Merrell Dow* teaches that a state cause of action containing as an element a violation of a federal statute does not confer "arising under" jurisdiction if the federal statute does not provide for a private right of action).

Seventh Circuit: *E.g., Dillon v. Combs*, 895 F.2d 1175, 1177 (7th Cir. 1990) (no federal jurisdiction over state claim alleging violation of federal statute as element of state claim where Congress did not create private right of action under the federal statute and where actions in state court under state law provided "ample power" for parties to enforce federal statute) (citing *Merrell Dow*).

Eighth Circuit: *E.g., Emerada Pub. School Dist. #127 v. Sanford*, 750 F. Supp. 418 (D. N.D. 1990) (no federal jurisdiction over state fraud and negligence claims alleging violation of federal impact aid provisions because "Congress has not provided a private cause of action for violation of [the] federal statute, [and] a claimed violation of the statute is not sufficiently 'substantial' to confer federal question jurisdiction") (citing *Merrell Dow*).

Ninth Circuit: *E.g., Utley v. Varial Assocs., Inc.*, 811 F.2d 1279 (9th Cir.), *cert. denied*, 484 U.S. 824 (1987) ("[u]nder *Merrell Dow*, if a federal law does not provide a private right of action, then a state law action based on its violation perforce does not raise a 'substantial federal question' sufficient to confer federal question jurisdiction"); *Millers Nat'l Ins. Co. v. Axel's Express, Inc.*, 851 F.2d 267 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012

(1989) (state indemnity claim involving determination of federal interstate commerce law did not give rise to federal jurisdiction) (applying *Merrell Dow*).

Tenth Circuit: *Todd Holding Co., Inc. v. Super Valu Stores, Inc.*, 744 F. Supp. 1025 (D. Colo. 1990) (violation of federal mail and wire fraud statutes as element of state civil claim does not confer federal jurisdiction) (applying *Merrell Dow*).

Eleventh Circuit: *Hudson Ins. Co. v. American Elec. Corp.*, 748 F. Supp. 837 (M.D. Fla. 1990) (interpretation of CERCLA in insurance coverage case does not give rise to federal jurisdiction) (applying *Merrell Dow*).

District of Columbia Circuit: *District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 10 (D.C. Cir. 1988) (no federal jurisdiction over claim which incorporates federal statute because incorporation of the statute does not make the claim one "arising under" federal law) (citing *Merrell Dow*).

No widespread split of authority in interpreting *Merrell Dow* exists. Instead, under the plain guidance of *Merrell Dow* and in keeping with long-standing historical jurisdictional analysis, courts all over the country properly are accepting federal question jurisdiction only where that question is substantial enough to "serve congressional purposes and the federal system," as intended by 28 U.S.C. § 1331. *Merrell Dow*, 478 U.S. at 814. Clark and Rhyne have presented no special and important reason for this Court to grant certiorari, S. Ct. R. 10.1, and their petition should be denied.

II. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF CLARK AND RHYNE'S COMPLAINTS BECAUSE NO FEDERAL QUESTION JURISDICTION EXISTS OVER A STATE NEGLIGENCE CLAIM WHICH MERELY INCORPORATES BY REFERENCE A FEDERAL STANDARD OF CARE, WHERE NO PRIVATE CAUSE OF ACTION EXISTS UNDER THE FEDERAL STATUTE.

A. *Merrell Dow* Disposes Of Petitioners' Jurisdictional Claim Absolutely.

Even if there were a split of authority interpreting *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986), which there is not, this case in inappropriate for certiorari. On the merits, this case is *materially identical* to *Merrell Dow*. The Fourth Circuit did not stretch in interpretation, did not apply the *Merrell Dow* rule to a unique fact pattern, and did not analogize or drag the law in unintended directions. The case below met *Merrell Dow* on all fours, and jurisdiction did not lie.

The *Merrell Dow* plaintiffs alleged in negligence that defendant had "misbranded" the drug Bendectin in violation of the Food, Drug, & Cosmetic Act ("FDCA"), that the label did not provide adequate warnings of danger, and that the FDCA violation directly and proximately caused their injuries. 478 U.S. at 805-806. Plaintiffs recognized that "Congress did not intend a private federal remedy" for FDCA violations, *id.* at 810-811, but argued that jurisdiction was proper because of the "substantial federal question" raised.

This Court found that no federal jurisdiction existed. The Court held that, absent statutorily-created federal private remedies, "the presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system." 478 U.S. at 814. This Court also

rejected plaintiffs' contention that the federal courts are best situated to rule on issues of interpretation of federal laws. *Id.* at 816.

In summary, this Court unequivocally held that:

> a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the Constitution, laws, or treaties of the United States."

478 U.S. at 817 (citing 28 U.S.C. § 1331).

As the Fourth Circuit found, "the present case is not distinguishable from *Merrell Dow*." *Clark v. Velsicol Chem. Corp.*, 944 F.2d 196, 198 (4th Cir. 1991). Clark and Rhyne concede that Congress did not intend a private federal remedy for HMTA violations. Pet. at 37. *See Borough of Ridgefield v. New York S. & W. R.R.*, 810 F.2d 57, 58 (3rd Cir. 1987) ("HMTA contains no [express or implied] provision authorizing private suits to enforce the act or regulations issued under it"). Clark and Rhyne simply allege that "the negligence of the [respondents] in not complying with the mandates" of the packaging, shipping, and labeling requirements of HMTA was the cause of their alleged injuries. Pet. at 3-4, 38. Clark and Rhyne's complaints are merely state negligence claims—which set forth as the standard of care the regulations of HMTA—and do not "aris[e] under the Constitution, laws, or treaties of the United States," 28 U.S.C. §1331.

Petitioners "cannot by artful pleading transform their state negligence action into a substantial federal question." *Clark*, 944 F.2d at 199; *see generally* cases cited *infra*, at pages 4-7. The Fourth Circuit properly affirmed dismissal of the suits.

B. Cases Conferring Federal Question Jurisdiction Implicate Substantial Federal Rights Not Found In Petitioners' Claims.

Clark and Rhyne maneuver to avoid the binding dispositive precedent of *Merrell Dow* by citing its dissent and attempting to distinguish its facts. Clark and Rhyne argue for jurisdiction based on *West 14th Street Commercial Corp. v. 5 West 14th Owners Corp.*, 815 F.2d 188 (2d Cir.), *cert. denied*, 484 U.S. 850 (1987), *Milan Express Co., Inc. v. Western Surety Co.*, 886 F.2d 783 (6th Cir. 1989), and *City of New York v. Rapgal Assocs.*, 703 F. Supp. 284 (S.D.N.Y. 1989). As the Fourth Circuit held, Clark and Rhyne's reliance on these cases is misplaced; in each instance, jurisdiction was afforded because the plaintiff sought to enforce rights *created by federal law*, and no such rights exist here. *Clark*, 944 F.2d 198-99.

Finding a "qualitative difference," the Second Circuit distinguished the facts of *Merrell Dow* from those before it in *West 14th Street*. The court explained that:

> In *Merrill Dow* [sic] the federal statute was merely incorporated by reference as a standard of conduct in a state negligence action. Here the situation is quite different. In construing the Condominium Relief Act in a state cause of action, the federal issue is decisive because upon that Act's construction the vindication of rights and definition of relationships *created by federal law* depends.

West 14the Street, 815 F.2d at 196 (emphasis in original). *See also Rapgal Assocs.*, 703 F. Supp. at 287 ("[w]ithout the federal statute and federal regulations, the right asserted by the City in this suit would never have existed"). Thus, as recent opinions have pointed out, *West 14the Street* found jurisdiction specifically because the federal law at issue "conferred rights" to the parties, and the case is "fully consistent" with *Merrell Dow*. *J.A.*

Jones Constr. Co. v. City of New York, 753 F. Supp. 497, 504 (S.D.N.Y. 1990); *see Clark*, 944 F.2d at 198-99.

Similarly, in *Milan Express*, the Sixth Circuit distinguished *Merrell Dow* "on several grounds" not found here, noting that the *Milan Express* plaintiffs: (1) "relied exclusively on federal law in their suit to recover on bonds required, promulgated, and regulated by [federal law];" (2) argued that "their rights . . . were *created by* federal law;" and (3) demonstrated a "specific and compelling federal interest." *Milan Express*, 866 F.2d at 788-89 (emphasis added). The *Milan Express* court "asserted jurisdiction because the [plaintiffs] were arguing that their rights were created by federal law, whereas the plaintiffs in *Merrell Dow* were claiming that the alleged violation of federal regulations was merely evidence of negligence and not the actual basis of recovery." *Clark*, 944 F.2d at 198.

Neither Clark and Rhyne's "rights" nor their "relationship" with Velsicol and Forshaw were "created by federal law." Rather, just like the plaintiffs in *Merrell Dow*, Clark and Rhyne have merely incorporated by reference in their state negligence action the standards of conduct codified in certain federal regulations; the regulations are not themselves the "actual basis of recovery." *Merrell Dow* governs, and petitioners' claims fail to confer jurisdiction.

III. THE COURT OF APPEALS PROPERLY UPHELD THE DISTRICT COURT'S DISCRETION TO DISMISS CLARK AND RHYNE'S COMPLAINTS WITHOUT SPECIFYING WHETHER THEIR CLAIMS COULD BE RE-FILED IN NORTH CAROLINA STATE COURT.

Clark and Rhyne wrongly insist that even if the courts below properly dismissed their complaints for lack of subject matter jurisdiction, both the District Court and the Fourth Circuit abused their discretion under Rule 41(b)

of the North Carolina Rules of Civil Procedure by not specifying whether Clark and Rhyne could re-file their claims in North Carolina state court. Clark and Rhyne seek relief under North Carolina Rule 41(b) because the Rule's "saving clause" potentially cures their limitations proscription.[2] The argument misses the mark entirely.

Notwithstanding petitioners' misleading statement of the procedural record, the federal courts below did not "deprive" Clark and Rhyne of any rights which the state rule may confer. Pet. at 43-51. The Fourth Circuit simply addressed the "re-filing" issue by affirming the dismissal specifically "without prejudice to any action plaintiffs may bring in state court." *Clark*, 944 F.2d at 199. The Fourth Circuit correctly left to the North Carolina courts the issue of whether North Carolina Rule 41(b) would operate to "save" Clark and Rhyne's actions if re-filed in North Carolina state court.

Clark and Rhyne did re-file in North Carolina state court, where they asserted that North Carolina Rule 41(b) preserved their claims. The state superior court disagreed, and dismissed the state complaints. Clark and Rhyne are now pursuing their rights on appeal in North Carolina.

Petitioners have presented no cause for certiorari on the "re-filing" issue. Their attempt to create a conflict amongst the federal circuits on this point is preposterous. Moreover, petitioners are incorrect on the merits of their claim.

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[2] N.C. Gen. Stat. § 1A-1, Rule 41(b) provides in pertinent part:

> If the court specifies that the dismissal of an action commenced within the time prescribed therefor, or any claim therein, is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal.

A. There Is No Split Of Authority On The Propriety Of A Federal Court's Dismissal Of An Improperly Filed Suit Which May Be Time-Barred Upon Re-Filing, Where Application Of The State Limitations Period Can Be Tested In State Court.

No case of which respondents are aware has found an abuse of discretion where a federal court simply dismissed, without prejudice, a suit over which the federal court had no jurisdiction whatsoever. Petitioners' hyperbolic protests about their purported "right" to re-file in state court cannot transform the Fourth Circuit's ordinary dismissal into some malevolent misappropriation. The issue of whether the North Carolina rule "saved" petitioners' claims is being litigated in North Carolina; the federal court was not obliged to (or able to) preserve Clark and Rhyne's claims by forging new state jurisdictional boundaries for the state court to apply. The cases petitioners cite offer no support to their contrary claim.

In *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208 (1st Cir. 1987), Pet. at 53, *defendant* improperly removed a case to federal district court and the court dismissed the action due to the absence of federal jurisdiction (applying now defunct derivative jurisdiction rule). The First Circuit held that the district court should have remanded the case back to state court instead, so that plaintiff—which had not initiated the removal—could pursue the claims it had properly and timely filed in state court. Even if *Patriot Cinemas* were remotely similar to this case, which it obviously is not, the rule is completely inapplicable because remand is not an option here.

In five other cases petitioners cite, the federal courts agreed they could retain jurisdiction over pendent or ancillary state law claims after dismissal of federal claims in order to preserve state claims which might otherwise be time-barred. Pet. at 54-57 (citing *Danner v. Himmelfarb*, 858 F.2d 515 (9th Cir. 1988), *cert. denied*, 490

U.S. 1067 (1989); *Duckworth v. Franzen*, 780 F.2d 645 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986); *Quality Foods de Centro Am., S.A. v. Latin American Agribusiness Dev. Corp.*, 711 F.2d 989 (11th Cir. 1983); *Joiner v. Diamond M Drilling Co.*, 677 F.2d 1035 (5th Cir. 1982); *O'Brien v. Continental Ill. Nat'l Bank & Trust Co.*, 593 F.2d 54 (7th Cir. 1979)). In all instances, the state claims originally were properly filed in the federal court "[b]ecause the court already [had] jurisdiction over the main [federal] claim." *Danner*, 858 F.2d at 521. These cases are therefore inapposite; the federal courts here had no basis whatsoever to "retain" jurisdiction, since none ever existed.

In the two other pendent state claim cases petitioners cite, the federal court, before exercising its discretion to dismiss plaintiff's entire suit after dismissing plaintiff's federal claims, ensured that the plaintiff's state claims could be re-filed in state court. Pet. at 57-58 (citing *Financial Gen. Bankshares, Inc. v. Metzgar*, 680 F.2d 768 (D.C. Cir. 1982); *Brewer v. City of El Cerrito*, 666 F. Supp. 1346 (N.D. Cal. 1987)). Again, the state claims at issue originally had been filed properly in federal court, as part of a larger suit. In neither case did the federal court find an abuse of discretion for a dismissal where, as here, jurisdiction never was vested in the federal court at all.

Finally, in *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424 (1965), Pet. at 48-51, this Court addressed tolling of a *federal* statute of limitations, which the federal courts were and are in the best position to interpret. The Court, examining the legislative intent behind the Federal Employers' Liability Act, found the Act's specific federal limitations period tolled under the filing circumstances of the case. Here, the North Carolina courts are in the best position to evaluate—and are presently evaluating—whether North Carolina's limitations period was tolled under the circumstances presented.

B. North Carolina Rule 41(b) Did Not Provide Petitioners With A Right To Re-File In North Carolina State Court.

Even if the "re-filing" argument were properly before this Court, petitioners' tolling argument fails because the federal rules, rather than the North Carolina rules, applied to the dismissal below. Clark and Rhyne allege that North Carolina Rule 41 applies in federal courts sitting in diversity in North Carolina. Pet. at 46-47. But the District Court here did not have diversity jurisdiction, as petitioners necessarily concede. Pet. at 5. Where the only jurisdiction invoked by a district court is that which allows it to deny subject matter jurisdiction, federal law applies exclusively. *Blackwelder v. Crooks*, 151 F. Supp. 26, 28 (D.D.C. 1957), *aff'd in part and rev'd in part on other grounds*, 252 F.2d 854 (D.C. Cir. 1958) ("Federal procedure is governed by Federal Rules and by decisions of Federal courts, which differ on many points from the procedure prevailing in some of the States"); *see also Murphy v. Dyer*, 260 F. Supp. 822, 823 (D.Colo. 1966), *aff'd*, 409 F.2d 747 (10th Cir. 1969) (federal district court applying Fed. R. Civ. P. 12(b) rather than Colorado R. Civ. P. 12(b)).

The applicable *federal* rule of dismissal, Fed. R. Civ. P. 41—cited by the Fourth Circuit, *Clark*, 944 F.2d at 199—has no savings clause. *See Bockweg v. Anderson*, 402 S.E.2d 627, 629, *reh'g denied*, 406 S.E.2d 599 (N.C. 1991); *Haislip v. Riggs*, 534 F. Supp. 95, 98 (W.D.N.C. 1981). Any state court action brought subsequent to a Federal Rule 41 dismissal, therefore, must be commenced within the applicable statute of limitations time period, just as though the federal suit had never been filed. *Evans v. Chipps*, 287 S.E.2d 426, 429 (N.C. App. 1982) ("plaintiff's filing of a complaint in federal district court was unavailing to prevent a statute of limitations bar in this [state court] action").

Even assuming, *arguendo*, that North Carolina Rule 41(b) did apply, Clark and Rhyne were not "entitled" to re-file their complaints in North Carolina state court. North Carolina Rule 41(b) places "authority to determine whether the nonmoving party in any action should be permitted to commence a new action" squarely with the trial judge. *Whedon v. Whedon*, 328 S.E.2d 437, 439 (N.C. 1985). "[T]he exercise of that power lies within the trial court's sound discretion and will not be disturbed on appeal in the absence of a showing of abuse of discretion." 328 S.E.2d at 439. North Carolina Rule 41(b) simply "allows the court to dispose of . . . a claim in final fashion, while at the same time protecting those parties *who can demonstrate that they should be afforded another opportunity* to produce sufficient evidence." 328 S.E.2d at 444 (emphasis added). Petitioners had the burden to convince the trial court that they deserved a second chance, *see Whedon*, 328 S.E.2d at 445, and they failed to do so.

In *Johnson v. Bollinger*, 356 S.E.2d 378 (N.C. App. 1987), the appellate court refused to allow the plaintiff-appellant to re-file a dismissed claim. The court was unable to "say the trial court's dismissal . . . was 'manifestly unsupported by reason' " because the plaintiff "never moved that the [trial] court condition the terms of its dismissal." *Id.*, 356 S.E.2d at 383 (citing *Miller v. Ferree*, 351 S.Ed.2d 845, 847 (N.C. App. 1987)). "[A]bsent such a motion . . . the record is devoid of any facts from which the trial court or this Court could determine why plaintiff should be given a chance to re-file his complaint." *Johnson*, 356 S.E.2d at 383.

Similarly, in *Burgess v. Equilink Corp.*, 652 F. Supp. 1422 (W.D.N.C.), *aff'd mem.*, 828 F.2d 17 (4th Cir. 1987),[3] the court refused to apply the savings provision of North Carolina Rule 41(b) because the plaintiff had

[3] The *Burgess* court was sitting in diversity, and, therefore, properly applied North Carolina law. *Burgess*, 652 F.Supp. at 1423.

not satisfied his burden of convincing the trial court that he should be allowed to re-file. The court noted:

> The Plaintiff had ample opportunity to seek an amendment of the Order to specify that the dismissal of the state law claim was without prejudice and a new action based on those claims could be brought within one year pursuant to Rule 41(b).

Burgess, 652 F. Supp. at 1425. The plaintiff's claims could not be "saved" because:

> Plaintiff did not properly seek amendment of that Order to comply with the criterion of Rule 41(b) which he now purports to invoke and his failure to do so takes his claims out of the savings clause [of Rule 41(b)].

Id.

The same result obtains in this case. Clark and Rhyne "did not properly seek amendment of [the] Order to comply with the criterion of Rule 41(b) which [they] now purport[] to invoke." Clark and Rhyne's complaints, therefore, cannot be saved under North Carolina Rule 41(b).

CONCLUSION

No compelling reason to grant certiorari exists. The Fourth Circuit and the District Court properly dismissed Clark and Rhyne's complaints because the suits did not confer federal jurisdiction. *Merrell Dow* ensures that a plaintiff may not merely invoke a federal standard of care in a state law cause of action and secure federal question jurisdiction. This Court should deny Clark and Rhyne's petition for a writ of certiorari.

Respectfully submitted,

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Dated: January 13, 1992

APPENDIX

APPENDIX

N.C. Gen. Stat. § 1-1A, Rule 41. *Dismissal of Actions.*

(a) *Voluntary Dismissal; effect thereof.*—

(1) By Plaintiff; by Stipulation.—Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

(2) By Order of Judge.—Except as provided in subsection (1) of this section, an action or any claim therein shall not be dismissed at the plaintiff's instance save upon order of the judge and upon such terms and conditions as justice requires. Unless otherwise specified in the order, a dismissal under this subsection is without prejudice. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless the judge shall specify in his order a shorter time.

(b) *Involuntary dismissal; effect thereof.*—For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52 (a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication upon the merits. If the court specifies that the dismissal of an action commenced within the time prescribed therefor, or any claim therein, is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal.

(c) *Dismissal of counterclaim; crossclaim, or third-party claim.*—The provisions of this rule apply to the dismissal of any counterclaim, crossclaim, or third-party claim.

(d) *Costs.*—A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis. If a plaintiff who has

once dismissed an action in any court commences an action based upon or including the same claim against the same defendant before the payment of the costs of the action previously dismissed, unless such previous action was brought in forma pauperis, the court, upon motion of the defendant, shall make an order for the payment of such costs by the plaintiff within 30 days and shall stay the proceedings in the action until the plaintiff has complied with the order. If the plaintiff does not comply with the order, the court shall dismiss the action.